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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOHN W. BALLMANN, APPELLANT,
v.
VIVIAN J. FAGIN, UNITED STATES Marshal for the Southern District of Ohio. } No. ~~827~~ 240.

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BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

A national bank in Cincinnati recently suffered a serious loss; a large sum of money in cash disappeared from its vaults. The Federal grand jury was investigating the occurrence to fix the criminal liability; the circumstances plainly and necessarily pointed to some person in the bank's service, although what person is so far matter of suspicion. The provisions of section 5209, Revised Statutes, were therefore guiding the grand jury's inquiry.

Ballmann, a broker of Cincinnati, was a witness before the grand jury. It seems that on examination

to bring out the relations to his establishment of a supposed speculative customer passing under the names of "A. Smith" and "A. Johnson," he denied substantially that he kept or had a cashbook. The subpœna (issued April 7) required him to produce a cashbook among other documents showing transactions under those names. Thereupon the following proceedings took place:

On the same day (April 7) Ballmann appeared before the grand jury; his examination was futile, it seems, for the grand jury immediately reported in writing to District Judge Thompson that Ballmann refused to produce the cashbook, which was material to their investigation. Ballmann appeared in open court the same day with counsel and the court ordered him to produce all books and papers pertaining to his business and within his control. On April 7 the grand jury reported again and charged contempt, because on his reappearance Ballmann failed and refused to produce the cashbook and refused to answer these questions:

> (*a*) State what on account No. 140, sheet No 1, on this big ledger now in use in your business, these figures under the word "folio" on the debit side of the account, to wit, 349, 349, 349, 349, 349, and 351, refer to.
>
> (*b*) Do not these figures 349, in your handwriting on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

The case was immediately presented to Judge Thompson in open court, Ballmann and his counsel being present, and evidence was heard. The court adjudged Ballmann in contempt and made an order *nisi* that Ballmann produce the book and answer the questions by noon of April 10, or be committed to the Miami County jail "until he complies * * * or is discharged by due process of law." On April 10, before the grand jury, Ballmann was still recalcitrant and refused to produce the book and declined to answer the questions. Then the court ordered him to be taken into custody and confined as previously directed. The petition for habeas corpus to the Circuit Court (Lurton, J.) followed:

The writ was issued forthwith (April 10); on April 12 the marshal made return by producing the defendant in court, the United States answered, the defendant replied, the case was immediately heard, and on the 13th the petition was dismissed, the writ discharged, and the prisoner remanded. On the 14th an allowance of appeal direct to this court was prayed and assignment of errors filed; appeal was allowed on condition that the transcript be filed with the clerk of this court by April 24, and the defendant was admitted to bail in the sum of $5,000.

JURISDICTION; SCOPE OF REVIEW ON HABEAS CORPUS.

The evidence in the contempt proceedings is before the court. But the facts are found by the district judge, and his finding was approved by the circuit judge on habeas corpus, and this court will not review

or disturb those findings. Judge Lurton accurately states the limit of the reviewing power when he says:

> In such a case the only inquiry admissible is whether in making the order imposing the punishment the court acted within its jurisdiction. * * * The findings of fact, if the court had jurisdiction, are not open to review on a writ of habeas corpus. But when, as in this case, the contention is that the court exceeded its jurisdiction, it is admissible to examine the record of commitment, including the evidence, if made part of the record by bill of exceptions or other order of the court, to see whether jurisdiction existed to make the order which has been disobeyed. If jurisdiction depended upon evidence of a state of facts, then the absence of any evidence which would justify the order made would demonstrate the failure of jurisdiction and render the order of commitment void.

Reviewing the proceedings and evidence on this principle, Judge Lurton concluded that—

> Judge Thompson did not exceed his jurisdiction by requiring the production of a book which evidence showed to be in the possession or under the control of the petitioner.

On this point I submit that if the court shall think that in this court also the findings of fact should be reexamined on the same theory, the court must come to the conclusion reached by Judge Lurton. But will the judgment in contempt of a court of competent jurisdiction, so far as resting upon the determination of a *fact* alone, be reviewed at all by this court?

In the *Swan* case (150 U. S., 637) the controlling fact of seizure of goods *in custodia legis* was admitted, and the lower court adjudged the contempt as a matter of law resulting from that fact. When this court says, as it did in that case, reiterating "what has so often been said before, that the writ of habeas corpus can not be used to perform the office of a writ of error or appeal," that error in the views or conclusion of the lower court does not go to the power of the court, and that the judgment can not be attacked on habeas corpus even if error has actually supervened, this rule must apply *a fortiori* to the finding of the initial and concrete fact upon which the contempt proceedings are based. The initial fact here found by the District Court is that the book existed. Next in order comes the finding of mixed fact and law that the refusal to produce it is contempt. That finding is within the rule and beyond the power of an appellate court to review upon habeas corpus.

In *Ex parte Davis* (112 Fed. Rep., 139) the relator was an attorney, and was charged with conduct in and out of court which, if accompanied with malicious intent, or if it embarassed and obstructed the administration of justice, amounted to contempt of court. The fact that the intent and effect appeared was found by the Circuit Court, and the Circuit Court of Appeals held that to hear and decide and punish if guilty was within the jurisdiction of the lower court and its action can not be reviewed on habeas corpus.

> This question, it must be here observed, does not involve an inquiry into the truth of the

> specific facts recited in the order of commitment, as constituting the contempt. As the writ of habeas corpus does not perform the office of a writ of error or an appeal, these facts can not be reexamined or reviewed in this collateral proceeding. They present a case which, so far as the subject-matter is concerned, was manifestly within the jurisdiction of the Circuit Court. (*Ex parte Terry*, 128 U. S., 289, 305.)

It is not necessary to speculate now what would be open to review on appeal or writ of error to the judgment in contempt, or what the proper Court for such review would be. But whether it is this Court or the Circuit Court of Appeals, or may be either (*Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S., 397), it is to be remembered that so far as the contention is addressed to the merits of the case, and not to the jurisdiction of the lower court—(190 U.S. p. 38):

> An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. (*Louisville Trust Co.* v. *Comingor*, 184 U. S., 18, 26; *Ex parte Gordon*, 104 U. S., 515.)
>
> And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. (Section 5, act of March 3, 1891, 26 Stat., 826, c. 517, as amended by the act of February 20, 1897, 29 Stat., 492, c. 68; *Chetwood's case*, 165 U. S., 443, 462; *Tinsley* v. *Anderson*, 171 U. S., 101, 105; *Cary Manufacturing Co.* v. *Acme Flexible Clasp Co.*, 187 U. S., 427, 428.)

The constitutional basis of jurisdiction in this court; indefiniteness of punishment.

The case is brought here directly on the ground that the fourth and fifth amendments to the Constitution are involved. That is sufficient for the jurisdiction of this court under paragraph 4, section 5, of the Circuit Court of Appeals act. The provision of the fourth amendment is:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

The fifth amendment provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself.

The other errors assigned (Rec., pp. 49–50) aver that there was no evidence to sustain the order of commitment in contempt; and that the punishment inflicted is void for indefiniteness. As I have just pointed out, the first of these can not be considered.

The punishment is necessarily indeterminate here, but it contravenes no rule. Punishment in contempt often takes this phase, where witnesses resist, "until" the obstinate person obeys. It is not like some flagrant impertinence or impropriety before a court, or some violence upon the court or its officers, or in the court's presence. Such an occurrence but for the effect and penalty is definitely ended when the immediate event is past. The punishment may therefore be definite as a lesson and penalty only for the offense,

but here a result is sought and must be compelled. The refractory person is to be reduced, so that he shall, if possible, cease his obstruction to all the court's proceedings. Besides, inasmuch as the present grand jury expires by absolute limitation of law on October 1 next (sec. 572, R. S.), the punishment imposed is not indeterminate. It is definite on the principle *id certum est quod certum reddi potest.* The term of imprisonment is absolutely limited to October 1 next, and the appellant can shorten it whenever he sees fit to obey.

The opinions below.

A brief review of the opinions of Judge Thompson and Judge Lurton will emphasize the real nature of the case and bring us to the important question involved, viz, the nature and extent of the constitutional privilege as to self-incrimination.

The witnesses were before Judge Thompson, and he heard them, the foreman of the grand jury, and three employees of Ballmann who were naturally reluctant witnesses. It is evident that these witnesses testified before the grand jury that there was a cashbook in use until a day or two before Ballmann first appeared before the grand jury, and that posting references in the "loose-leaf" ledger which was produced referred to the folio or page of that cashbook. The attempt of the witnesses when before Judge Thompson to show that the ledger "folio" entries did not necessarily refer to the cashbook, because loose slips were also used, is a purposeless attempt to confuse and mislead, because it is perfectly well known in all

systems of bookkeeping that original slips from which entries are posted naturally bear the number of the page of the book of first entry—that is, the cashbook—on which they are entered, for purposes of checking and identification, so that "No. 349, 351," etc., might refer to the slip, as well as the cashbook; but whether the ledger was posted from the slip or the cashbook, the cashbook page was inevitably the real significance of the number.

It is incredible that even in the kind of brokerage business in which it is convenient to have transactions wiped out in oblivion as far as possible at the end of each day, there should not be a cashbook. That is the foundation book of account in every business, and it is too much to expect reasonable men to believe that there was not a cashbook in Mr. Ballmann's business. Accordingly, Judge Thompson (Appendix p. 60), in weighing the evidence, finds that—

> Looking through it all, I have no manner of doubt that there was a cashbook in use and employed in this business, and that it was there Monday [April 3], and that this clerk, Clements, and Ballmann and Hunt all made entries upon the ledger from the cashbook, and they referred to the page of the cashbook by the number under the heading "Folio." * * * I feel constrained to say upon this evidence that that book to-day is within his [Ballmann's] control, if not in his actual possession.

Judge Thompson points out that Ballmann is not charged with any offense, and there is nothing in his

relation to the matter under investigation that tends to criminate him; that to sustain his counsel's suggestion of perjury would enable any man, desiring to withhold evidence material and necessary to promote the ends of justice, to answer one question and then decline to answer further questions on the theory that if it is assumed he lied in his first answer, his remaining answers might confirm that charge and incriminate him, and thereupon he might claim exemption from giving any information whatever.

Judge Lurton held that the evidence strongly tended to show that Ballmann had a cash book, currently used in his business down to April 3, and that this book was still either in his possession or under his control; that the evidence "made a case in which he [Ballmann] was called upon to show, if such was the fact, that the book described in the evidence to which the order of April 8 and the order of April 10 referred had been lost or destroyed after the date when it was last seen in Mr. Ballmann's possession or in his office."

On the question of privilege Judge Lurton cites *Ex parte Irvine* (74 Fed. Rep., 954), decided by Circuit Judge Taft, which held that a witness can not avoid answering any question by the mere statement that the answer would tend to criminate him, without regard to the reasonableness of that statement. Judge Lurton himself states the principle thus:

> It is for the judge before whom the question arises to decide whether an answer thereto may reasonably have a tendency to criminate the witness or to furnish proof, an element or a

> link in the chain of evidence necessary to convict him of crime [citing the rule as laid down by Chief Justice Marshall during the trial of Aaron Burr (Fed. Cases, No. 14692e)].

Analyzing the situation and the nature of a *direct* answer, Judge Lurton proceeds:

> This witness had been asked to produce a certain book. He had said that that book did not exist to his knowledge, and now that answer is being tested by further questions growing out of certain entries in his own handwriting in another book which he had produced. Of course it is obvious that a witness who has answered a question in one way can not say: "If I am further questioned, if I am further examined about that matter, I may criminate myself by making inconsistent answers." That would permit every witness to close his mouth when he found himself about to be cornered.

The learned judge's conclusion was that a direct answer to the two questions would not reasonably tend to implicate the defendant or criminate him.

ARGUMENT.

I.

The origin of the guarantees; the Boyd and Counselman cases; other authorities.

The guarantee of the fourth amendment was founded on the principle that every man's house is his castle, and guarded against unwarrantable intrusion by executive agents. "General warrants" of a Secretary of

State, not naming persons or things, were finally overthrown in the cases of Wilkes and Entick (note, p 426, Cooley's Constitutional Lim., 7th ed.; *Wilkes case*, 2 Wils., 151, 19 State Trials, 1405; *Entick* v. *Carrington*, 2 Wils., 275, 19 State Trials, 1030). In America the chief abuse was by writs of assistance from the courts to revenue officers, empowering them to search suspected places, in their discretion, for smuggled goods, which Otis condemned as the worst instrument of arbitrary power, "because they placed the liberty of every man in the hands of every petty officer." (Cooley *ut sup.*, p. 428; John Adams's Works, Vol. II, pp. 523, 524; 4 Bancroft's Hist. U. S., 414; Quincy, Mass., Rep., 51, and Appendix, p. 395, for a history of writs of assistance, by the late Mr. Justice Gray, *Boyd* v. *United States*, *infra*.) "All these matters are now a long way in the past; but it has not been deemed unwise to repeat in the State constitutions, as well as in the Constitution of the United States, the principles already settled in the common law upon this vital point in civil liberty" (Cooley as cited; as to revenue seizures, *Henderson's Distilled Spirits*, 14 Wall., 44, shows that the regulations of Congress, however unreasonable they seem, must prevail). In other words, the historical foundation and reason of the rule was protection against *executive* tyranny and interference in private affairs without any proper judicial occasion or process. That evil has disappeared, and the remedy of the constitutional guarantee must be construed in the light of its origin and purpose, and must not be en-

larged beyond its true scope or perverted to meet an entirely different situation.

Story traces the subject along the same lines and a note cites the famous case of Bollman and Swartwout as illustrating forcibly the operation of the amendment (2 Story on Constitution, 5th ed., secs. 1901, 1902, pp. 647–650, and note 2, p. 649). Indeed, the stress and meaning of the guarantee are clearly indicated by the concluding clause requiring a due warrant and specification of its objects. *Search warrants* and *arrests* are in mind and regular action by a judicial magistrate is enjoined.

The natural view certainly is that in the present case there is neither seizure, search, or arrest. A court duly inquiring into a criminal transaction summons a witness and orders him to bring the books of his business, as material to the inquiry, and to answer certain legitimate and competent questions.

The principle of the guarantee of the fourth amendment appeared much more recently in the law than did that of the fifth amendment. The first statements of the former are found in the decisions of the Wilkes and Entick cases; but the rule of the fifth amendment appears first in the canon law phrase, *Nemo tenetur seipsum prodere* (or *accusare*), which grew out of the heresy trials in England early in the seventeenth century.

However, since the court has, in recent cases, found an intimate connection between the fourth and fifth amendments, and has construed the present meaning of

both in the light of their origin and history, it will be unnecessary to trace these principles further from the original sources or the text-books.

In *Boyd* v. *United States* (116 U. S., 616) it was pointed out that both the fourth and fifth amendments relate to the personal security of the citizen; that they nearly run into and mutually throw light upon each other; that when the thing forbidden in the fifth amendment—viz, compelling a man to be a witness against himself—is the object of a search and seizure of his private papers, it is an unreasonable search and seizure within the fourth amendment. The law there was a customs law, authorizing a court of the United States in revenue cases, on motion of the Government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be taken as confessed. The court examines carefully the reasons and development of these guarantees, but their views and conclusions were all expressed with reference to a case where the "witness" under the compulsion of the law was substantially the defendant on trial; the proceedings were *in rem* for forfeiture of goods alleged to have been fraudulently imported. The foundation of the court's judgment is this: That a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a "criminal case" within the meaning of that part of the fifth amendment which declares that no person "shall be

compelled in any criminal case to be a witness against himself." The essential distinctions, therefore, between the Boyd case and the case at bar are manifest without further statement.

In the *Counselman* case (142 U. S., 547) the grand jury was investigating alleged violations of the interstate commerce laws punishing, in effect, the giving or receiving of unlawful discriminations in rates or charges. The witness, a receiver and shipper of grain, was asked whether he had obtained from various railroads less than tariff rates on transportation of grain, or knew of any person or company who had. He declined to answer, on the ground that it might tend to criminate him.

The court called attention to the broad language of the fifth amendment ("*any* criminal case"), and held that the matter under investigation by the grand jury was criminal and that the "case" before the grand jury was a criminal case; that if Counselman had been guilty of the matters inquired of, he was liable to criminal prosecution; that the reason for his refusal was his apprehension that if he answered the questions truly and fully, as he was bound to do if he answered them at all, it might appear that he had committed a crime for which he was so liable. The appellant was accordingly discharged.

The court reviews the State cases at length and comes to these conclusions on the principles of law involved: That whether the language of a constitutional provision is like that of the Constitution of the

United States ("in any criminal *case*," or "in any criminal *prosecution*"), or broader ("no man can be compelled to give evidence against himself"), the manifest purpose of all such provisions is to prohibit the compelling of testimony of a self-criminating kind from a party or witness. All such constitutional guaranties should have, as far as possible, the same interpretation. Unless a statute wholly exempts from prosecution, so as to fulfill the purpose of the constitutional provision, and takes its place as a protection, the privilege must be preserved. "Legislation can not abridge a constitutional privilege or replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." Section 860, Revised Statutes (providing that no evidence judicially obtained from a party or witness shall be used against him in any criminal proceeding, except that this exemption does not extend to perjury in testifying), unlike some State statutes, does not undertake to compel self-criminating evidence; and, on the other hand, unlike some State statutes, section 860 does not supply a complete protection from all the perils against which the constitutional provision was designed to guard. "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

It may be remarked here that, in consequence of the *Counselman* decision, the interstate-commerce laws

were amended so as to afford this complete protection, and accordingly in *Brown* v. *Walker* (161 U. S., 594) the witness was compelled to answer. (See as to anti-trust law, act of February 25, 1903, 32 Stat., 854, 903.)

The court in the *Counselman* decision notes specifically that while section 860 protects a witness against the use of his testimony in a prosecution against himself, it does not prevent the use of his testimony to search out other testimony, nor prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion. It is shown that Chief Justice Marshall in *Burr's Trial* stated the true sense of the rule to be that no witness is compellable to furnish any one of the many links frequently composing the chain of testimony necessary to convict of crime; and that this principle was followed in *People* v. *Mather* (4 Wend., 229) by the declaration that the exemption extends to the disclosure of any fact which might constitute an essential link in a chain of evidence of guilt, although that fact alone would not indicate any crime.

Nevertheless, appreciating the full extent of the Counselman decision, and its authoritative comment on the State cases, I note certain elements of that case regarding which it is worth while to point out one or two other features of the State cases reviewed by the court. In the first place, Counselman was asked questions relating to *previous* transactions with which he was manifestly connected and which were supposed to be criminal. He was asked

questions going to the heart of the substantive matter which the grand jury were investigating; the questions did not relate to occurrences before the grand jury itself,—to the witness's own previous acts and statements there. Counselman's "apprehension was that if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime"—that is, was a party to the particular violations of law which the grand jury were investigating. Ballmann does not say this, but apparently fears that, if he answers, his previous answers or statements before the grand jury will be shown to be untrue. In Emery's case, as quoted in the *Counselman* opinion (107 Mass., 172; 142 U. S., 572, 573), the witness declined in writing to answer one of the questions upon the grounds, "first, that the answer thereto will accuse me of an indictable offense; second, that the answer thereto will furnish evidence against me by which I can be convicted of such an offense."

Here the precise question is whether the witness, simply refusing before the grand jury to answer certain questions, without, in the first instance, invoking his privilege or assigning any reason, and denying that he ever had the book called for, and in court, through counsel, saying as to the book that "we haven't got it" and "there is no evidence that the defendant had any book in his possession at any time since this inquest was instituted," and handing the court a paper reading as to the questions asked, "I refuse to answer, as they might tend to incriminate me," without more, can, under

the ruling of the *Counselman* case, escape from the compulsion to answer and produce. Is it prosecution for perjury before the grand jury which he fears, and, if it is, is he relieved from testifying on that score, or is it prosecution for the previous offense which the grand jury were investigating, or is it some other prosecution; and in any case can he terminate this whole inquiry without further and more specific statement setting up definitely, under oath, that his answers and production of the book would subject him to prosecution for this or that offense, stating how and why and respecting what offense the privilege is invoked? It is true that his counsel suggested fear of perjury at the hearing before the District Court (opinion of Judge Thompson, Appendix, p. 61), but this claim has never been distinctly and definitely made.

In fine, is a witness in the exact situation of Ballmann protected by the privilege?

Following the Counselman case certain opinions of the court touch upon or approach the present inquiry, but do not solve it. The *Brimson* case (154 U. S., 447) decided that a certain auxiliary proceeding in the Circuit Court, under the interstate commerce acts, was a case or controversy to which, under the Constitution, the judicial power of the United States extends. In showing that a witness in that situation may invoke his constitutional privilege and that power over interstate commerce does not carry with it authority to destroy or impair the fundamental guranties of personal rights, the court referred to *Counselman* v. *Hitchcock* with approval. In *Brown* v.

Walker (161 U. S., 591), to which I have already referred, the amendment of 1893 to the interstate commerce act, forbidding the plea of self-crimination as an excuse for testifying, but exempting a witness from any prosecution or penalty on account of any transaction concerning which he may testify, was held sufficient to satisfy the constitutional guaranty of protection.

Beyond certain references to the principles and previous cases, in illustration or collaterally (*Robertson* v. *Baldwin*, 165 U. S., 275, 282; *Bram* v. *United States*, 168 U. S., 532, 543–545), the court has not further passed upon the meaning of the guaranty.

Adams v. *New York*, 192 U. S., 585, involved an entirely different point (as to admissibility on trial of papers obtained under a valid search warrant before indictment) and referred to the *Boyd* case but not the *Counselman* case.

Brown v. *Walker* recognized fully the authority of *Counselman* v. *Hitchcock*, but pointed out as follows the legitimate limitations of that decision:

> The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to

be made the tool of others who are desirous of seeking shelter behind his privilege.

This suggests the related idea expressed in *Temple* v. *Commonwealth* (75 Va., 892) that "when a witness on oath declared his belief that his answer would tend to criminate himself, the court could not compel him to answer unless it was perfectly clear from a careful consideration of all the circumstances in the case that the witness was mistaken and that the answer could not possibly have such a tendency." *Temple* v. *Commonwealth* is among the cases cited in *Counselman* v. *Hitchcock* and approved the previous Virginia case of *Cullen* v. *Commonwealth* (24 Gratt., 624), "upon which much reliance was placed in *Counselman* v. *Hitchcock*." (*Brown* v. *Walker*, 161 U. S., at p. 595.)

Now, the cautionary words in *Brown* v. *Walker* quoted above describe the situation here precisely, and the question is immediate, Who is to determine whether the protection is fanciful, the danger real or imaginary, the witness mistaken or not; and the answer necessarily is, the court before whom that question properly comes.

There are other expressions of this caution. In the recent exhaustive work of Professor Wigmore (Treatise on the System of Evidence in Trials at Common Law: 1904) the qualifying ideas are admirably stated. I am aware that the views of even the most distinguished text writers are of limited authority in the courts, but the reasoning of able minds and students of the law is always helpful, especially where general principles are concerned and original or unsettled propositions in legal logic are discussed. The author is

discussing the *duty* of giving testimony, requiring sacrifices from every member of the community of time, labor, and privacy—sacrifice "of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. * * * When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon. * * * The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. * * *"

It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expend them as if they were large and fundamental principles, worthy of pursuit into the remotest analo-

> gies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

The learned author then goes on to speak of the fair demand of the witness that the exaction should be as little onerous as possible with respect to delay, loss of time, and other annoyances. (3 Wigmore, pp. 2967, 2968.)

Again, in discussing the history of the privilege against self-crimination (*ut sup.*, p. 3069, secs. 2250 *et seq.*) he quotes from Bentham, from a certain report of English Commissioners on Criminal Law, and from Stephens's History of the Criminal Law, and then proceeds (p. 3102) as follows:

> It is enough for justice and for the commonwealth that the privilege exists, immovably fixed in the Constitution. The good which it aims at consists in that general fact and system, and not in the individual application of it to a given claimant. *That* effects mostly harm—a particular harm which we suffer for the larger good.
>
> The privilege, therefore, should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be set-

tled by a consideration of its historic scope before the constitutions were made; but after all this the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with judicious appreciation. In the past twenty years, and especially in a few American courts, this practical difference of effect is plainly apparent; for, under the guise of reasoning and interpretation, the privilege has by them, in a spirit of implicit favor, been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense. Even Lord Hardwicke, who a century and a half ago called it "a rule of great justice and tenderness" [citing *Harrison* v. *Southcote*, 2 Ves. Sr., 389, 394], could he now revisit the glimpses of the moon and observe the rule in those courts, would marvel what manner of justice we had contrived. But a reaction must come. A true conservatism must recommence to operate. More than one great modern judge is found to pronounce against the favor that has in the past been granted to it.[a] A multiplicity of statutes have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.

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[a] The footnote here is as follows:

1882, Jessel, M. R., in Ex parte Reynolds, 15 Cox Cr. 108, 115 ("Perhaps our law has gone even too far in that direction"); 1875, Appleton, C. J., in *State* v. *Wentworth*, 65 Me., 234, 241 ("It is the privilege of crime; the interests of justice would be little promoted by its enlargement").

In the *Irvine* case (74 Fed. Rep., 954), which Judge Lurton cites, Judge Taft, on petitions for habeas corpus, followed the *Counselman* decision, and discharged the prisoners on the ground that the evidence before the court and the circumstances under which it was sought to elicit answers afforded reasonable ground for concluding that the evidence sought might criminate them and probably establish an offense. Therefore the plea of privilege should have been upheld, and the Circuit Court was without power to compel answers. These were the facts: The witnesses were summoned on the trial of an indictment against numerous defendants for conspiracy to violate the anti-lottery act of 1895. It was first brought out at the trial that policy lottery shops were conducted in Cincinnati by the defendants, operating between Covington and Cincinnati by means of "runners" carrying bets and money slips or certificates of drawings back and forth between the Kentucky office and the Cincinnati policy shops; that the witnesses were "runners" or "carriers." Thereupon one of the witnesses was asked whether the policy writers and another "runner" were not engaged in that business, and the other witness was asked whether he did not know one of the policy writers. They declined to answer on the ground that it might tend to incriminate them. There was evidence suggesting that one of the witnesses had been "coached" in behalf of defendants, and that he did not invoke the privilege in good faith. He had not claimed the privilege when before the grand jury.

Judge Taft, in the course of the opinion, lays down the essential and controlling principle as follows:

> The great weight of authority, as well as a due regard for the right of the community to have the wheels of justice unclogged as far as may be consistent with the liberty of the individual, leads us to reject the doctrine that a witness may avoid answering any question by the mere statement that the answer would criminate him, however unreasonable such statement may be. The true rule is that it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. * * * It must appear to the court from the character of the question and the other facts adduced in the case that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime.

Judge Taft quotes from the opinion of Chief Justice Marshall on the Burr trial (*infra* and 25 Fed. Cas. No. 14692 *e*) on the point that it is the province of the court to judge of the criminating effect of direct answer to the question, and cites the English statement of the rule as laid down in *Regina* v. *Boyes* (1 Best & Smith, 329), followed and approved in *Ex parte Reynolds* (20 Ch. Div., 294), viz, that—

> To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer;

but that—

> If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt * * * that a question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering.

Other authorities on the rule that it is for the court to determine whether a direct answer may criminate the witness are as follows:

The English doctrine on the point is set forth in Best's Law of Evidence, section 128, pp. 175–180.

The American doctrine is thus stated in Greenleaf on Evidence:

> Sec. 451. Where witness may refuse to answer. Exposure to penalty. In regard to the privilege of witnesses in not being compellable to answer, the cases are distinguishable into several classes: (1) Where it reasonably appears that the answer will have a tendency to expose the witness to a penal liability, or to any kind

> of punishment, or to a criminal charge. Here the authorities are exceedingly clear that the witness is not bound to answer. And he may claim the protection at any stage of the inquiry, whether he has already answered the question in part, or not at all. If the fact to which he is interrogated forms but one link in the chain of testimony, which is to convict him, he is protected. And whether it may tend to criminate or expose the witness is a point upon which the court are bound to instruct him; *and which the court will determine, under all the circumstances of the case;* but without requiring the witness fully to explain how he might be criminated by the answer which the truth would oblige him to give.

Chief Justice Marshall in the *Burr* case, noting that Government counsel construed the privilege too narrowly and counsel for the witness too broadly, thus stated the rule as to the province of the court:

> When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court can not participate with him in this judgment, because they can not decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of

> the privilege which the law allows and which he claims. * * * It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case a witness must himself judge what his answer will be, and if he say on oath that he can not answer without accusing himself, he can not be compelled to answer.

It is evident, on reading the opinion, that what the Chief Justice held was that it is for the court to determine whether a direct answer to the question put *could* criminate the witness, and if it could, then it is for the witness to determine whether the answer he would make *would* criminate him.

In *United States* v. *Miller* (2 Cranch Cir. Ct., 247) the court held that a direct answer to the question put to the witness to a duel—whether he saw the defendant shoot his opponent—would not criminate him, and ordered him to answer, and upon his refusal committed him for contempt. The doctrine of the case is thus stated in the headnote:

> A witness in a criminal cause, will be compelled to answer a question which he says, upon his oath, he can not answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the

> same offense for which the defendant stands indicted; provided the court should be of opinion that no direct answer to the question could furnish evidence against the witness.

In that case Chief Judge Cranch was of opinion that an answer to the question might criminate.

In *Sanderson's* case (3 Cranch Cir. Ct., 638) it was held, as stated in the headnote:

> A witness is bound to answer, before the grand jury, to a question the answer to which might implicate himself; and he is the sole judge whether it will. *The court is to decide whether the answer could implicate the witness.*

In *United States* v. *McCarthy* (18 Fed., 87), Circuit Court Southern District, New York, the court said:

> It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (*Regina* v. *Boyes*, 1 Best & S., 311; Whart. Ev., sec. 538.)

In *Stevens* v. *The State* (50 Kans. 712) the court said (pp. 716–717):

> The rule, as we understand it, is to require the witness to answer when it is apparent to the court that an answer would not interfere with his legal right and privilege. If, however, the fact upon which he is interrogated forms but a single link in the chain of evidence which

> would lead to his conviction, he is protected. *And this is a matter for the court to determine, under the facts and circumstances surrounding each case.*

In that case the court referred to *Ford* v. *State* (29 Ind., 541), where it was said:

> After the witness claims his privilege, the defendant may show by other witnesses that the circumstances were such that the act of intercourse would not have been criminal, and when it is thus made clear that the right to be silent does not exist, the witness may be compelled to answer.

In *Minters* v. *The People* (139 Ill., 363), the court said (p. 366):

> If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is protected; and *whether it may tend to criminate or expose the witness is a point which the court will determine under all the circumstances of the case*, but without requiring the witness fully to explain how he might be criminated by the answer which the truth would oblige him to give.

In *The People* v. *Mather* (4 Wend., 229), the court said (p. 254):

> My conclusion is, that where a witness claims to be excused from answering a question because the answer may disgrace him or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude. Where he claims to

> be excused from answering because his answer will have a *tendency* to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then *the court are to determine whether the answer he may give to the question can criminate him, directly or indirectly*, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think that the answer *may* in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give.

That it is for the court and not for the witness to determine whether an answer could criminate him is shown by the following Massachusetts cases, where the witness was required to answer: *Commonwealth* v. *Willard* (39 Pick., 476); *Commonwealth* v. *Kimball* (41 Pick., 366), opinion by Chief Justice Shaw.

In *Ex parte Senior* (37 Fla., 1), the court, after reviewing the authorities, said (p. 20):

> While the witness must judge of the effect of his answer, and should not be required to explain how it will criminate him, yet the court must determine under all the circumstances of the case whether such will be its tendency from the question asked; and where from the nature of the investigation and the character of the testimony sought, it reasonably appears that the answer may criminate or tend to criminate, the

witness has the right to claim his privilege, and is not bound to answer. (*State* v. *Duffy*, 15 Iowa, 425; *Kirschner* v. *State*, 9 Wis., 140; *Chamberlain* v. *Wilson*, 12 Vt., 491; *Ex parte Boscowitz*, 84 Ala., 463.)

The doctrine announced by Chief Justice Marshall in *United States* v. *Burr* was applied by the Supreme Court of Iowa in *Richman* v. *The State* (2 Greene, 532). In that case a witness before the grand jury was required to answer the following question: "Do you know of any person, other than yourself, being engaged in gaming at any time within two years, in the county of Muscatine?"

The court said (p. 534):

> When it is evident to the mind of the court that the answer can not accuse the witness the court should require him to respond to the interrogatory. If this were not the case, it would be in the power of the witness, when called upon to give testimony in a criminal case, to refuse to do so. If he is to be sole judge whether the answer would implicate him by thus answering it would be impossible to elicit any testimony. Perjury could not only be committed with impunity by stating that the answer would criminate him, but the guilty would be screened from merited punishment. We can not sanction a rule fraught with such dangerous consequences. The direct tendency of such a rule would be to suppress truth and prevent the administration of justice. Therefore, we think the better and safer rule to be

that of compelling the witness to answer when it is apparent to the court that such answer would not interfere with his legal privilege. In this case, it was evident from the scope of the question, that an answer could not possibly infringe upon this right, and yet the witness makes himself the judge, and refuses the answer.

The position of the witness furnishes a familiar illustration of the evil consequences which would result from the enforcement of such a rule as he has contended for in the argument, and a most potent reason for the distinction which we have made.

Cited in *Printz* v. *Cheeney* (11 Iowa, 469).

The subject was carefully considered by the Supreme Court of North Carolina in *La Fontaine* v. *Southern Underwriters* (83 N. C., 132).

The court said (p. 141):

Upon a review of the authorities, we are clearly of opinion that the view of the law propounded by Lord Wensleydale (10 Ex., 701) in *Osborn* v. *The London Dock Company*, and acted upon by Vice-Chancellor Stuart in *Sidebottom* v. *Adkins* (3 Jurist. N. S., 631, 632), is the correct one; and that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is no reasonable ground to apprehend danger to the witness from his being compelled to answer. (Best Ev., 125; *Forbes* v. *Willard*, 37 How. Pr. Rep., 193.)

In *Floyd* v. *The State* (7 Texas, 215) the doctrine of *United States* v. *Burr* is stated to be the correct rule on that subject.

To the same effect is the opinion of the Supreme Court of Wyoming in *Miskimmins* v. *Shaver*. (8 Wyo., 392, 418–419.)

In nearly all, if not all, the cases in which the privilege was claimed and allowed it was apparent from the question asked, as pointed out by Chief Justice Marshall in Burr's case, that a direct answer would criminate the witness. These cases contain no discussion of the question whether it is for the court or the witness to determine if an answer would criminate him, but it is apparent that it was regarded as a matter for the court.

The King v. *Gordon*, 2 Doug. K. B. Rep., 593.
Paxton v. *Douglas*, 19 Ves. Ch., 224.
Maloney v. *Bartley*, 3 Campb., 210.
Cates v. *Hardacre*, 3 Taunt., 424.
Rex v. *Pegler*, 5 C. &. P., 687.
Fisher v. *Ronalds*, 16 Eng. Lon. & Eq., 417.
Emery's Case, 107 Mass., 172.
In re Graham, 8 Ben., 419.
Bank v. *Henry*, 2 Den., 155.
People ex rel. Taylor v. *Seaman*, 8 Miscel. (N. Y.), 152.
Cullen v. *Com'th*, 24 Gratt., 624.
Smith v. *Smith*, 116 N. C., 386.
Lester v. *Boker*, 6 Blachf. (Ind.), 439.
Johnson v. *Goss*, 2 Yerg. (Tenn.), 110.
Lea v. *Henderson*, 1 Coldw. (Tenn.), 146.
Ex parte Clarke, 103 Cal., 352.

II.

The necessity of sensible and reasonable interpretation: distinctions between this case and those where the privilege has been upheld.

Now, to apply all these doctrines and to show that the present case is to be broadly and certainly distinguished from *Counselman's* case, the rule, like all other legal rules, is the product of experience and reason and must be interpreted in a sensible and reasonable way. A man may not claim the privilege on a whim of the mind or figment of the imagination. It is not a matter of bald assertion to be securely followed by impenetrable silence and portentous mystery. In any case we have the right to analyze. In *Counselman's* case a direct, affirmative answer to the question would have shown that the witness himself was a fellow-offender in the violations of law under investigation. He alone, perhaps, knew what his situation was. If he had said "yes" to the questions whether he had obtained less than published rates, he would have been instantly liable to indictment. His own testimony could not be used against him, but with that lead the Government could confidently proceed to search out other testimony and construct a case. If he said "no," and the fact were otherwise, his situation would be about the same, with this difference and additional risk, however, that the imperfect exemption of section 860 excepts perjury in testifying.

Irvine and Wagner were in similar case. Their complicity in the offense had already appeared.

Direct answers to the questions would have tended to establish their guilt. The connection was certain, immediate, and material; the reason and reasonableness of their refusal were patent.

What are the distinctions in the present case? I take up the analysis *seriatim* in the two aspects of the cashbook and the questions.

(a)

As to the book.

The subpœna directed Ballmann to bring his books, including the cash book, showing accounts in certain names. He broadly denied in reality keeping any cash book. If he says now that his denial only referred to such specific accounts, the reply is that he has never really changed this denial and says still that he has not got a cash book and has never had such a book since the investigation began. If this is supposed to save his veracity by implying previous existence of the book and ignorance of its fate and present whereabouts, and to justify his original denial, he should have explained what had become of the book or why he did not know what has become of it. He is concealing and doubling, and he offers us puerile inferences.

The court, in order to pass over his refuge behind the named accounts, ordered him then to produce *all* books used in his business—a perfectly justifiable order under the circumstances. But the final order of April 10, and the only one on which his complaints are or

can be based, ordered him simply to "*produce the said cashbook* and answer the questions set out in said charges of contempt," the District Court having determined necessarily, as did Judge Lurton, that the book was in existence and under the defendant's control. He is in a dilemma, of course. He has not invoked his privilege respecting the book, because to do so would admit its existence and show his previous statements to be false. So we need not inquire whether the privilege operates with the same effect on a refusal to produce a book as on a refusal to answer a question. In reason it would seem not, because the production of a book is preliminary to examination and is not like a definite answer to a definite question. To apply the privilege flatly to a refusal to produce on that ground would manifestly be altogether too vague and general, and would come under the condemnation of unreasonableness.

Now, it may be claimed that the fourth amendment was invoked on this branch of the case—that is, as to the production of the book, as well as on the questions put to the witness—that the call for the book and the answers to the questions are essentially connected; that the assignments of error apply the fourth amendment to the orders for the book, and for these reasons, without specifically raising the privilege in the District Court as to the book, there is more than a mere question of fact presented there and the constitutional objections are available on that branch. But we insist that regarding the book the record raises only the question of fact which has been finally adjudged beyond review. If the pe-

titioner wished to contend that the order for the book was covered by the privilege, he should have said so at the hearing before Judge Thompson. He should have said specifically and under oath that he declined to produce the book, because to do so would admit that he had it, would show that he had stated falsely before, might subject him to prosecution and therefore would tend to criminate him; that the order for it was an unreasonable search and seizure, and that he was protected from complying with the order by the fourth and fifth amendments. He made no such claim; he rested on the stubborn adherence to his original statement that the book was not in existence or was not in his possession or under his control. His position in the matter is his fault, due solely to himself; clearly there was nothing before the District Court but the question of fact, viz, whether the book existed and Mr. Ballmann could produce it. That was adjudged and is beyond review, and Mr. Ballmann is not in a position to complain on constitutional or any other grounds here as was pointed out in discussing jurisdiction.

In support of the view that the book episode raises the question of fact only, and is separable from the questions asked, it must be remembered that a caution has been uttered against merging the operation of the fourth and fifth amendments and viewing them as connected under all circumstances. In the *Boyd* case, already cited, the statute compelled production of books and papers by making nonproduction

a confession of liability, and the liability, being to forfeiture of goods for fraudulent importation, was considered by the court to be criminal in its nature. It was held that under such circumstances one who was really himself a defendant would be compelled to be a witness against himself, and that the compulsion constituted an unreasonable search and seizure; that the fourth and fifth amendments are intimately related and throw great light upon each other. But the concurring opinion, delivered by Mr. Justice Miller for the Chief Justice and himself, considered that the statute does not hint at either search or seizure, because the party is not required to surrender the custody of his papers, but only to produce them in court for examination in his presence; that the amendment allows reasonable searches, and, if the thing sought is found, reasonable seizures.

The ground of the concurrence was "that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. * * * But, this being so, there is no reason why this court should assume that the action of the court below in requiring a party to produce certain papers as evidence on the trial authorizes an unreasonable search or seizure of the house, papers, or effects of that party."

> While the framers of the Constitution had their attention drawn, no doubt, to the abuses of this power of searching private houses and seizing private papers, as practiced in England,

> it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place for any thing. This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person and place to be searched, are still permitted. I can not conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute. (116 U. S., p. 641.)

So, here, an order of court requiring the production of evidence by means of books of account before a grand jury, through service of subpœna on one who has that evidence in his possession, can not be deemed an unreasonable search or seizure, since neither search nor seizure is ordered.

(b)

As to the questions.

I pass from the book to the questions, which bring together the different elements of the controversy and present squarely the contention as to the fifth amendment. If the cash-book phase is not disposed of on the aspect just submitted, and is considered by the

court not to be separable but to be indissolubly connected with the two questions, then the case involves both the fourth and fifth amendments.

In *Boyd's* case (*ut supra*) the reason given by the court for connecting the guarantees of the fourth and fifth amendments is that unreasonable searches and seizures are almost always made for the purpose of compelling a man to give evidence against himself, and compelling a man to be a witness against himself throws light on the question, what is an unreasonable search and seizure? The court, finding that forfeiture of property by reason of offenses, though civil in form is criminal in nature, was dealing with a case wherein a defendant on trial was manifestly called on for evidence to convict himself and his goods—not goods, but men whose goods they are, offend and pay forfeit. The relation of the two guarantees in that situation is direct and apparent.

Coming, then, to the questions asked, they are:

> State what on account No. 40, sheet No. 1, on this big ledger now in use in your business, these figures under the word "folio" on the debit side of the account, to wit, 349, 349, 349, 349, 349, and 351 refer to?
>
> Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cash book in use in your business in January, 1905?

But there are certain preliminary matters to clear away. It can not justly be said that the district judge in hearing evidence offended against the salutary rule

preserving the secrecy of proceedings before a grand jury. The foreman of the grand jury and three witnesses before the grand jury were examined solely with reference to the one essential point of the witness's contempt of court. They brought out merely the facts that the witness did not produce the cashbook called for by the subpœna, that he said there was no such book used in his business to his knowledge, that nevertheless such book existed and was used, and that he refused to answer the questions asked. This is perfectly proper. If there is any remedy at all for contempt under such circumstances, if a witness before a grand jury is under the least control, the evidence heard is entirely consistent with the general rule of guarding from publicity proceedings before a grand jury. Such cases as this present a necessary exception. The *Counselman* case itself is authority for this proposition. The necessary revelation there of the questions and answers before the grand jury does not appear to have been challenged. It can not be successfully challenged here. Does the rule of secrecy prevent a grand jury from reporting such contempt? No one has ever thought so. Suppose the district judge did not deem it necessary to hear evidence, but proceeded to make his order on the grand jury's report; the witness could not set up his privilege without revealing *pro tanto* the proceedings before the grand jury, and necessarily he would have revealed them just as far as the witnesses in the contempt case did. He would have had to say that he declined to

produce and refused to answer in order to say why, viz, that the book did not exist, and that his privilege protected him. Suppose, finally, a different offense from contempt; suppose a witness before a grand jury attempting openly or secretly to bribe one of its members—would the rule of secrecy prevent any inquiry? It seems to me that the proposition is absurd and refutes itself; but it has been suggested, and may be brought forward here. Every case of contempt inquiry upon report of a grand jury is authority for our view. (*Counselman* v. *Hitchcock, supra; Smith* v. *People*, 20 Ill. App., 591; *People* v. *Kelly*, 24 N. Y., 74; *Cullen* v. *Commonwealth*, 24 Gratt., 624; *State* v. *Nowell*, 58 N. H., 314.) The reason for the rule of secrecy is well stated by Mr. Justice Nelson, sitting on circuit, in the case of *United States* v. *Reed* (27 Fed. Cas., 727, 738):

> The rule is founded upon public policy, to guard against abuses that might arise from a disclosure of their proceedings [the grand jury's] to the accused, and to protect witnesses who may have given evidence before them from being exposed to the ill will and resentment of parties indicted. The permission to disclose in the case of a complaint for perjury, or for the purpose of contradicting a witness, seems to remove every well-grounded objection to the rule.

Later cases are *United States* v. *Terry* (39 Fed. Rep., 355) and *United States* v. *Cobban* (127 Fed. Rep., 713).

Another preliminary point—it has also been suggested that the contempt case itself is criminal, and

that the witness invoked his privilege on that score. Contempt proceedings are *sui generis*, as the court has pointed out; a judgment in contempt is, in effect, a judgment in a criminal case. (*O'Neal* v. *United States*, *ante*.) Let us say that contempt obviously bears a criminal character. It is also true that summoning one charged with contempt as a witness in that case violates the privilege. (*In re Nickell*, 47 Kans., 734.) But how irrelevant and futile is that suggestion here! In the first place, the witness could not have intended to invoke the privilege in *that* behalf, because to comply with the order would not have criminated him, but would have cleared him; and in the next place, he was not a witness at all in the contempt proceedings.

But the witness here does not invoke his privilege under oath, unless after being sworn before the grand jury that oath goes out and attached to him in court when his counsel handed up to Judge Thompson his informal written claim of privilege. He says (rec., p. 15), that on his third appearance before the grand jury on April 10 he set up the privilege under oath. He does not expressly invoke the privilege on the contempt case, on the substantive crime which the grand jury were investigating, or on the possible charge of perjury in testifying to which he may have subjected himself. We are not informed why he invokes the privilege; his claim is most general and vague; it should be clear and specific. We are left to construe and apply the claim ourselves by a process of exhaustion. This I submit, is fatal in itself, under established principles of pleading.

The rule on this point of pleading is thus stated in equity (which follows the law in protecting against self-crimination): If the objectionable nature of the discovery sought appears on the bill, the protection may be claimed by demurrer; if it does not so appear, by plea setting forth the means by which the penalty or forfeiture will be incurred; and if the facts are such as to exclude both demurrer and plea, by answer, which must be equally specific. (Adams' Equity, pp. 2, 4, citing the following authorities showing the necessity of a clear and specific claim: *Parkhurst* v. *Lowten*, 1 Meriv., 391; *Attorney-General* v. *Lucas*, 2 Hare, 566; also *Finch* v. *Finch*, 2 Ves. Sr., 490.) It is significant that in equity, where the object of the bill is discovery of a fraud, the rule is modified and defendant will not be protected on the ground that the fraud sought to be discovered may be indictable as conspiracy at law, unless there is an indictment actually pending or a probability that one will be preferred. The result of an opposite course would be to render the very magnitude of a fraud its protection against redress. (Adams' Equity, as cited; *Chadwick* v. *Chadwick*, 31 Law J., 1853, 329.)

As to perjury.

The demand for close scrutiny of the facts, and for interpretation in the light of sense and reason, is to be emphasized again here. Ballmann does not claim that he will subject himself to a criminal prosecution for perjury, although, as I have said, his counsel intimated before Judge Thompson that this was his reason. *Non constat* if he answers and produces the cashbook that

he could be or would be prosecuted. The Government offered evidence tending to show that he had denied wholly having a cashbook; but it is not to be inferred that his privilege was invoked for that reason; it is not to be inferred that he told a falsehood. On the contrary, the truth of his statement is to be inferred until the contrary appears. Answers to the questions therefore would not imperil him, even if they should reveal that he has a cashbook, for, contrary to the tendency of the Government evidence of a false statement, his reply to the marshal's return does not deny that he has the book; it is evasive, of course; it says that "he denies that on the 8th day of April he refused to produce before said grand jury any book included in the order of the court made on April 7;" he says that "said order [the order of April 8 or April 10] * * * was made without any evidence that your petitioner had a cashbook or other book in his possession or under his control 'showing transactions under the name of A. Smith or A. Johnson.'" (Rec., p. 15.) He therefore repels and explains or qualifies an apparent false statement, and he is clearly and distinctly estopped from setting up now and applying his privilege to a possible charge of *perjury*.

As to the substantive offense under inquiry by the grand jury.

Mr. Ballmann comes nearest to solving the unsettled question for what reason precisely he invoked the privilege, when, in his answers under oath before the

grand jury on April 10, incorporated in his reply to the marshal's return (Rec., p. 15), he refers to a certain proceeding in the Court of Common Pleas of Hamilton County, Ohio. It seems that a certain plaintiff brought a civil suit against the "O'Dell Company" and various persons named as officers, stockholders, owners, and agents, including Ballmann, alleging that the company conducted a scheme of gambling known as a "bucket shop;" that the plaintiff lost money on account of this scheme of gambling by means of bets and wagers on the market price of stocks, grains, and other commodities; that the company "won" the sum lost, which was paid by the plaintiff and received by the company, and therefore he sues to recover it back by virtue of the statutes against gaming of the State of Ohio. The record of this suit was presented by Ballmann in connection with his refusal to answer the questions because of the privilege. It is only a civil suit; it does not suggest that Ballmann has subjected himself to criminal prosecution because of these transactions.

But it appears that under the laws of Ohio (Smith and Ben. Stat., sec. 6934*a*–1) it *is* a criminal offense to keep or to be in any manner connected with a "bucket shop;" and suit may be brought to recover back any money lost therein (secs. 4270, 4271). How can any testimony given by Ballmann before this grand jury be availed of in a civil suit to recover back money lost; or even in a prosecution by the State for the misdemeanor? The grand jurors (save as to perjury com-

mitted while testifying before them) are sworn to secrecy. This court will not presume that a grand juror would appear willingly in a State court and violate the oath he has taken by revealing any testimony given by Ballmann. Suppose a juror should do so? Upon objection by Ballmann or his counsel, the presumption is the court would not permit the juror to testify and thus violate his oath as a juror. And even if a grand juror should be subpœnaed as a witness and should refuse to answer any question as to any testimony given by Ballmann, and the State court should rule that he must answer (an altogether remote possibility), and should attempt to punish him for his refusal, is there any doubt of the power of a Federal court to protect its juror and to release him by the writ of habeas corpus?

Passing these points, however, we have to consider whether the production of the cashbook and direct answer to the questions propounded would reasonably subject Mr. Ballmann to prosecution in any capacity for the substantive offense of which the grand jury was inquiring.

Chief Justice Marshall in the *Burr* case, after stating the true rule (*ut supra*) as to a witness answering, between the two opposing principles of the public interest and the private privilege, applied the rule and ordered the witness to answer. The witness was Burr's private secretary and was questioned before the grand jury as to certain correspondence relating to Burr's supposed treason; if the witness answered he might (it

was claimed) subject himself to prosecution for misprision of treason, or for the misdemeanor with which also Burr was charged. The Chief Justice, showing that it is for the court to determine whether a direct answer to a question will criminate, held that under the circumstances appearing "the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact." The letter concerning which the witness was called on to give evidence was a cipher letter which Burr had written by the secretary—that is, it was in the secretary's handwriting. He was called on to state the meaning of its contents and pleaded the privilege. The precise question was, "Do you understand the contents of this letter?" The Government argument was that it *must* appear that he *may* criminate himself; if he anwers "no," if he be unacquainted with the cipher and innocent, he can not be incriminated; if he say "yes," it can not criminate unless coupled with other questions—he may know the key innocently, he may have acquired knowledge of the cipher long after the letter was written. It has not been shown that it *will* or *may* criminate him, etc. Mr. Wirt said: "What are the limits of '*a tendency to criminate*?' Any question may indirectly and remotely have a tendency to criminate or produce any other effect. The rule they insist on is almighty and boundless; any witness may thereby screen himself from giving evidence

against a person to whom he is attached. Like the Cretan labyrinth, it can never be traced nor pursued; and if the witness once get into it, you never can extricate him from it."

As the court will recall, Burr was charged with treason and with a misdemeanor as well under the neutrality statutes, "setting on foot and providing the means for a military expedition against the territories of a foreign prince with whom the United States were at peace." The Chief Justice states that if the letter contained evidence of treason, a fact not dependent on the witness's testimony and provable otherwise, and if the witness were acquainted with the treason when the letter was written, he may probably be guilty of misprision and therefore ought not to be compelled to answer any question the answer to which might disclose his former knowledge of the contents of the letter; and he then proceeds respecting the misdemeanor as follows:

> But if the letter should relate to the misdemeanor and not to the treason, the court is not apprized that a knowledge and concealment of the misdemeanor would expose the witness to any prosecution whatever. On this account the court was at first disposed to inquire whether the letter could be deciphered, in order to determine from its contents how far the witness could be examined respecting it. The court was inclined to this course from considering the question as one which might require a disclosure of the knowledge which the witness might have had of the contents of this letter when it

> was put in cipher or when it was copied by himself, if, indeed, such were the fact. But on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher—

the court held, as quoted above, that the witness would not be implicated by answering.

Thus, in that case the witness's knowledge, respecting the time when it was gained, was consistent with innocence, and hence there was no reasonable ground for apprehension to excuse him from testifying. (Vol. 1, Robertson's Burr's Trials, Philadelphia, 1808, pp. 205, 246, and particularly pp. 206, 217, 219, 224, 242–245.)

Judge Lurton, evidently having in mind possible complicity in the substantive offense as the basis of the petitioner's claim rather than perjury, applied Chief Justice Marshall's rule, and held that direct answers to the questions would not reasonably tend to implicate the petitioner and criminate him. I may add to the learned judge's suggestions as follows: The rule operates here on different circumstances from those of Burr's secretary, but the reasoning wholly controls this case, for it is quite apparent that direct answers to the questions would not tend to show any complicity in or guilty knowledge of the offense under investigation. It is possible, though unlikely, that there is no guilty bank servant at all. It is quite possible that he did not deal with Mr. Ballmann's office, or that he did not speculate under the disguises specified, or that Mr. Ballmann did not personally know

him, or did not know his identity in connection with the bank. After the questions are answered, it may be a long road before the real dangers indicated by these alternatives are reached, if they should ever be reached at all. The presumption is that Mr. Ballmann is innocent of guilt respecting the abstraction of the bank's funds. I submit with confidence that the district and circuit courts were right in considering that answers to the questions asked could not reasonably be viewed as criminating the witness, and the privilege could not therefore be interposed to save him from answering.

The court will remark that in Irvine's case there was some testimony showing that an attorney for the defendants had sent for the witness and told him to refuse to answer on the ground of the privilege. There is some hint at a similar situation in this record, for Judge Thompson uses the following language in his ruling on the complaint of the grand jury (Appendix, p. 61):

> There has been a great deal occurring here in the last day or two, in these corridors, which I will not refer to or characterize now, but I will not sit here and permit the grand jury to be hindered in its work, or the witnesses who go before the grand jury to be tampered with, or the interference and obstruction that have been manifest within the last day or two, and I expect to deal with it in a way that will establish a precedent here that shall forbid attempts of this character is the future.

The only reason why Judge Taft in the Irvine case

did not pass upon the motive of the witness in pleading his privilege and on the charge of bad faith was that he considered the criminating effect of the questions clear. His view of the correct rule to be deduced from the American and English authorities is that where the criminating effect of the question is doubtful, the motive of the witness may be considered, for in such case bad faith would tend to show that answer would not subject to prosecution or help to convict of crime.

The criminating effect of the questions here is at most doubtful and there is enough before the court on the matter of *bona fides* to make this an apt case for applying that rule. It seems most probable that the witness merely wishes to avoid annoyance or inconvenience, or does not choose to reveal any of the facts of his doubtful business, or is seeking to shield others from prosecution or publicity or condemnation in some form.

The just conclusions on this record are:

That since the District Court (the Circuit Court on habeas corpus concurring) noticed the claim of privilege but denied it on the ground that to answer the questions does not reasonably tend to criminate, there is nothing properly before this court for review on this proceeding except the questions of constitutional right. If the District court committed reversible error in that ruling, the only remedy is by appeal or writ of error to the proper tribunal on the judgment in contempt.

That whether the privilege be referable to the contempt case itself, to a charge of perjury, or to the offense

under the national banking laws, the petitioner can not avail of it—it was not adequately and specifically invoked. As to the contempt, he was not a witness, as to the perjury he is estopped, as to the substantive offense and the perjury as well it is not reasonable to claim that production of the cashbook and direct answers to the questions will criminate, and liability under the criminal laws of Ohio appears to be a far cry. The court and not the witness must determine whether such claim is reasonable, the court has determined against the claim, and that determination is correct on principle and is sustained by the authorities.

That the guarantees of the Constitution which are interposed, when properly read and construed in the light of all the authorities, do not embrace this case, and do not permit or justify the refusal to produce and answer.

If courts and juries possess any real authority in performing their function to investigate crimes and present and punish offenders, they must be able to compel obedience to regular judicial process and orders. It is difficult to imagine a case which would illustrate more strongly than this, involving as it does a gross violation of the national-bank acts, the necessity for vindicating judicial power and process. Accordingly I submit that the judgment below must be affirmed and the appellant remanded into custody, under the final order of the District Court.

HENRY M. HOYT,
Solicitor-General.

[The record of this case presents the curious anomaly, for some unknown reason, of not containing any one of the three opinions of the courts below. Judge Lurton's two opinions on habeas corpus were submitted to the court by the Government as an Appendix to the motion to advance. Judge Thompson's opinion in the contempt proceeding follows below.]

APPENDIX.

United States District Court, Southern District of Ohio, Western Division.

IN THE MATTER of JOHN W. BALLMANN. } In Contempt of Court.

RULING OF JUDGE THOMPSON ON COMPLAINT OF THE GRAND JURY.

The grand jury comes before the court and presents a written complaint which reads as follows:

> The grand jury for the April term, 1905, respectfully represents to your honor and charges that John W. Ballmann is guilty of contempt of court in this, that—
>
> Whereas, on the seventh day of April, A. D. 1905, said Ballmann was duly served with subpœna to appear before this court and this grand jury, to give testimony in a certain matter then under investigation and pending before said grand jury, and being required by said subpœna to produce a certain cashbook in use in his business did, on the seventh day of April, and also upon the eighth day of April, 1905, being still under the process of this court, and in contempt of the order of this court, and

for the purpose of interfering with the due administration of justice of said court and in said grand jury investigation, wilfully fail and refuse to produce said cashbook.

2nd. That the said John W. Ballmann, on the eighth day of April, 1905, while giving certain testimony before the said grand jury while under process of this court so to do, wilfully and knowingly refused to answer certain questions pertaining to said investigation and material thereto, which said questions are as follows:

"(*a*) State what, on account No. 140, sheet No. 1, on this big ledger now in use in your business, these figures under the word 'folio,' on the debit side of the account, to-wit, No. 349, 349, 349, 349, 349, and 351, refer to?

"(*b*) Do not these figures 349, in your handwriting, on account No. 140, refer to the folios in your cashbook in use in your business in January, 1905?"

Wherefore, said grand jury charges that said John W. Ballmann is in contempt of court, and asks that such proceedings may be had as in the premises are in accordance with law.

Ballmann was summoned before the grand jury as a witness. He had no other relation to the matter under investigation there. He was required to produce a book which was deemed to be pertinent to the investigation which was being prosecuted and he was required to explain certain entries in his ledger used in his business, which would tend to show the use of a certain cashbook. He refused to answer the questions and failed to produce the book, claiming, as I understand—if I am in error counsel will correct me—that no such book existed. I took it to be conceded in the discussion of the matter this morning that he denied before the grand jury the existence of such a book. Am I right?

Mr. McPherson. Yes, sir.

Mr. Shay. To his knowledge?

Mr. McPherson. To his knowledge.

Three of his employees, or three of the young men employed in the business with which Ballmann is connected, or which he is carrying on—whatever his relation to it may be—were called before the grand jury and testified. Their testimony furnished the basis for this complaint on the part of the grand jury, and upon the hearing of the complaint here these witnesses were called and testified before the court reluctantly. They testified before the grand jury yesterday; they testified before the court to-day upon the hearing of this application; and I am convinced by their testimony that there was such a book in existence, and that it was used and employed in this business, and that it was used by Ballmann himself; that it was in existence on Monday of this week, and that it was in the office or the place of business where Ballmann carried on business, or was connected with the business carried on there; that it was used on Monday last in keeping the accounts, making the entries in the books which were necessary, or resorted to, in the conduct of the business Ballmann was carrying on.

The ledger has been produced here, which shows in consecutive series, references to pages, under the head "Folio," of some book from which the entries in the ledger were made.

One of the witnesses, who used these books and made entries in these books, said that these paging figures did indicate the use of this cashbook, but not always; that sometimes they had reference to slips, not to the cashbook; and that the last entries (the last of which, I believe, were made on the 4th of this

month, and the next preceding, to which attention was called, at least, was made on the 3d of April), he thinks, were made from slips and not from this cashbook. But he was asked on the witness stand if he had not testified to the contrary before the grand jury. The witness was evidently embarrassed. The court must put a value upon this testimony, in view of the surroundings of these witnesses and their relation to the respondent here; they are employees in that business and they are testifying against their employer, and they testify with hesitancy and reluctance. One of them—the youngest one, the boy—testified to the same fact; he denied that he had made the statement to the grand jury, but being further pressed, he admitted that he had made the statement to the grand jury. Looking through it all I have no manner of doubt that there was a cashbook in use and employed in this business, and that it was there Monday, and that this clerk, Clements, and Ballmann and Hunt all made entries upon the ledger from the cashbook, and they referred to the page of the cashbook by a number under the heading "folio," although the witness Clements undertakes to say that sometimes slips were used, and he thinks slips were used on the 3d and 4th of this month.

Mr. Ballmann does not testify before the court, and all we have is his general statement before the grand jury that no such book ever existed. He does not come here and say that the book did exist and that he destroyed it, or that somebody had stolen it, or that it had mysteriously disappeared, without fault upon his part, and that he is unable to produce it here. He says nothing of that kind, and I feel constrained to say, upon this evidence, that that book to-day is within his control, if not in his actual possession.

There has been a great deal occurring here in the last day or two, in these corridors, which I will not refer to or characterize now; but I will not sit here and permit the grand jury to be hindered in its work, or the witnesses who go before the grand jury to be tampered with, or the interference and obstruction that have been manifest within the last day or two, and I expect to deal with it in a way that will establish a precedent here that shall forbid attempts of this character in the future.

The second assignment is that Ballmann refused to answer the questions which I have already read. Ballmann is not charged with any offense. He was simply called before the grand jury as a witness and there is nothing in his relation to the matter under investigation that tends to criminate him, or makes any suggestion of criminality, and when the court called his counsel's attention to that, the only suggestion that the court had from counsel was, that if he made a false statement, if he perjured himself when he denied that this cashbook ever had existence, the disclosures called for by these questions might tend to show that he was guilty of perjury in making that statement.

As was well said by counsel, to sustain that view would be simply to enable any man called before a grand jury or any other jury, who desired to withhold evidence that would be material in promoting the ends of justice, to make a statement in answer to the first question—a false statement, or a true one—and then when asked the second question, to say: "If it be assumed that I lied in answer to the first question, the answer to the second question may confirm that charge, may criminate me," and thereby he

exempts himself from giving information. Well, now, if that be the law, I prefer to have some other court say so.

I hold that the complaint of the grand jury is well founded; that Ballmann is in contempt in refusing to answer these questions and in refusing to produce the book called for. I omitted to say that the production of the book was called for by the subpœna that was served upon him, and was again called for when the court made the order—and I will ask the stenographer to read the language of the court—

(The order of the court is read, as follows: "I will make an order now requiring him to produce all books and papers pertaining to the business in which he is engaged, whether as employee or manager or proprietor—the business with which he is connected—all books and papers within his control.")

When that order was made, when that was said by the court, Ballmann was present and acquiesced in it; he was sitting alongside his counsel and his counsel said that an order was not necessary; that he would produce all books; and upon that representation the court went no further, but relied upon compliance with its demand for this book which the grand jury had made and which demand the court had repeated.

The only suggestion now is that if he did have the book Monday, there is nothing to show that he had it yesterday when the subpœna was served and when the court made the order. But I have already covered that. If it was in his possession and under his control on Monday, no showing being made to the contrary except his bald, naked statement before the grand jury that no such book ever existed, and when he is contradicted by his employees, who say that it did exist and

was in his office on Monday, and in view of the character of testimony which they were compelled to give reluctantly, I am justified, I think, in finding that the book is still subject to his control, and the court will order that he must answer these questions and must produce this book; otherwise, he will be committed to jail, the jail of the county of Miami, there to remain until he is willing to answer the questions and to produce the book.

The grand jury has adjourned until 12 o'clock Monday, and the witness must be ready to answer the questions and to produce the book at that time, or his commitment will follow, as indicated by the court.

O